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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1254

UNITED STATES STEEL CORPORATION, ET AL.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF UNITED MINE WORKERS OF AMERICA IN OPPOSITION

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The petition for certiorari filed by the petitioning steel companies is so totally devoid of any ground that would warrant this Court's review of the dismissal of their petition to review a supplemental order of the National Labor Relations Board that respondent United Mine Workers of America (hereinafter "UMWA") is reluctant to burden this Court with a detailed statement of facts. We will not add to the facts as set forth by the National Labor Relations Board (hereinafter "Board" or "NLRB"). The question

presented in this case is whether persons who were not parties before the NLRB nor bound by the contract clause upon which the Board ruled will be permitted to seek review of the Board's decision and order in the United States Court of Appeals after the unsuccessful charging parties themselves declined to seek review.

In the Court of Appeals, the Board argued that the case was not appropriate for review because there is no justiciable case or controversy. The UMWA agrees wholeheartedly with that proposition, but would go further. We contend that, even if there were a justiciable case or controversy, the petitioners have no standing to seek review, and the Court of Appeals could have properly dismissed the petition for review on this ground as well.[1]

On October 2, 1972, when the United States Court of Appeals for the District of Columbia Circuit issued its decision dismissing all appeals in that consolidated proceeding "for lack of a justiciable case or controversy and want of jurisdiction", *International Union, United Mine Workers of America* v. *NLRB (Dixie Mining Co., Dan S. Davison, United States Steel Corp., et al.)*, 468 F.2d 1139, 1140 (Pet. App. 5a), the Court noted (Pet. App. 9a):

> "The most salient fact about the 80-cent clause is that no party has yet appealed from the Board's second supplemental decision dismissing the 8(e) complaint. Accordingly, there is no party aggrieved properly before this Court within the meaning of Section 10(f) of the Act which delineates our appellate jurisdiction over the Board . . . The charging parties were aggrieved, but they have not as yet decided to file an appeal and obviously we cannot compel them to do so." (footnote omitted)

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[1] After the Court granted the Board's motion and dismissed the petition to review (Pet. App. 2a-3a), our motion to dismiss the petition was "dismissed as moot" (Pet. App. 3a).

The present case is in an identical posture to the case before the Court of Appeals in 1972: No aggrieved party has challenged the Board's supplemental decision; there is no justiciable case or controversy before the Court; and to require the matter to rest upon a record devoid of the facts peculiar to the petitioners would be prejudicial to the UMWA and not in the best interests of justice nor of the orderly administration of the courts.

In the underlying case, the Board held that the instant petitioners were not parties to the proceedings before it (Pet. App. 13a, n. 3). The first time any of the petitioners entered this proceeding was subsequent to the Trial Examiner's Decision and the Court of Appeals' remand when they attempted to file exceptions thereto. The Board denied their request for leave to file those exceptions "as these companies [United States Steel Corp., Bethlehem Steel Corp., Jones & Laughlin Steel Corp., Republic Steel Corp., C.F. & I. Steel Corp., Inland Steel Corp., and Youngstown Sheet & Tube Corp.] are not parties to the proceedings before the Board." (*Id.*) The Board did treat their brief as an *amicus curiae* brief and considered it on that basis. (*Id.*)

Section 10(f) of the National Labor Relations Act (29 U.S.C. 160 (f)) provides that, "[a]ny person aggrieved by a final order of the Board . . . may obtain review of such order in any circuit court of appeals . . . ." In order to be a "person aggrieved," one "must have been a party to the proceedings before the Board" and have suffered "an adverse effect in fact" as a result of its ruling. *C. Norris, The Developing Labor Law*, 876 (1971).

Amici curiae have long been distinguished from "parties" and denied the right to petition for review of judgments in which they were merely bystanders volunteering information to the Court. Thus, this Court has stated that

"[b]ecause an *amicus* is not a 'party' to the case, it would not have been entitled to file a petition to review a judgment on the merits by the Court of Appeals." *International Union, Local 283* v. *Scofield,* 382 U.S. 205, 209 (1965).

Since the petitioners were not parties to the underlying Board proceeding, there is no record evidence to support any claim that they have suffered an "adverse effect in fact" sufficient to bring them within the scope of a "person aggrieved."[2]

Before the Board, petitioners never claimed any specific "adverse effect in fact" by virtue of the challenged clause, nor could they. At issue is the validity of the 80-cent provision in the 1964 amendments to the National Bituminous Coal Wage Agreement of 1950 which was not incorporated into the collective bargaining agreement executed by the petitioner "captive coal mine" companies who produce coal to keep their own coke ovens in production. The clause was carried over to the 1968 Agreement signed by the captive companies, but the petitioners were exempted from the operation of the clause by a side letter agreement which

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[2] Compare, *Retail Clerks, Local 1059* v. *National Labor Relations Board,* 348 F.2D 369 (C.A.D.C. 1965), where a non-party union was found to have sufficient interest to seek judicial review because it had been named in a settlement order of the NLRB requiring the employer to cease and desist from giving it "unlawful assistance." There, the union was clearly a party in interest, if not in fact, and the "adverse effect in fact"—the label as a "sweetheart union"—could be fairly inferred without an evidentiary record as to effect. As we show, this is not the case here, and petitioners can draw no support for their position from this ruling.

provided that the clause would not be binding upon them until such time as it was held valid by a court of last resort.[3]

Because the petitioners were not bound by the clause now before this Court nor parties before the Board, there is no record evidence of their being adversely affected in fact by its operation.

There is warrant for treating the captive coal companies differently than the other signatories and requiring specific economic evidence as to their operations. Thus, for example, there is no evidence in the record of a ready availability from non-signatories of the metallurgical coal which meets their requirements. There is reason to believe that such coal is available in sufficient quantities from sources already owned and operated by signatories, and the issue may well be one of insufficient magnitude to warrant this Court's attention. The utter lack of record evidence on this score serves to emphasize that the Court of Appeals is an inappropriate forum for this critical issue to be raised in the first instance. Whatever unspecified, potential harm petitioners now claim to suffer is insufficient to constitute a "justiciable case and controversy" within the jurisdiction of the federal courts.

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[3] In the latest National Bituminous Coal Wage Agreement signed in 1971, the 80-cent clause was replaced by a contract provision, to which petitioners are parties, which calls for the payment of different tonnage royalties into the UMWA Health and Welfare Fund. These developments were not made part of the record before the Board which relied on the prior agreements and based its findings on 1967 coal industry figures. See and compare, *International Union, United Mine Workers of America* v. *National Labor Relations Board, etc. (Dixie Mining Co. and Dan S. Davison)*, 486 F.2d 1139 (C.A.D.C. 1972) (No. 23,947) (Pet. App. 5a-7a), where the Court of Appeals dismissed as moot a case based on the protective wage clause which appeared in pre-1964 agreements, on the ground that the clause in question had been replaced by the 80-cent clause.

Moreover, if metallurgical coal were available in sufficient quantities from non-signatory sources, since the petitioners were not parties before the Board, there has been no opportunity to develop before the appropriate fact-finding tribunal evidence relating to the specific economic situation of the captive coal mines. Such evidence would demonstrate whether the captives have a greater specific temptation to subcontract their operations such as would warrant application of the 80-cent clause to them, regardless of the appropriateness to the signatories who were parties below.

Since the salient facts relative to the petitioners herein were not developed below because the petitioners were not parties to that proceeding, it would be extremely prejudicial to the UMWA to be forced to support the Board's decision on a record utterly devoid of facts relevant to the non-parties who petitioned for review of that order.

The petition for writ of certiorari should be denied.

Respectfully submitted.

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